BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARTURO AGUILAR	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,960
AMERICOLD LOGISTICS, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 18, 2001 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on January 15, 2002.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Decision. The parties also agreed that claimant's wage records for the period from December 16, 2000, through January 19, 2001, were part of the evidentiary record and should be considered by the Board.

ISSUES

In the Application for Hearing filed with the Division of Workers Compensation, claimant alleged that he had sustained an accidental low back injury in May 2000, as well as July 2000 through August 22, 2000. But at the regular hearing, the parties stipulated

that the appropriate accident date for the alleged series of accidents should be May 30, 2000.

In the June 18, 2001 Decision, the Judge awarded claimant five weeks of temporary total disability benefits; 13 weeks of temporary partial disability benefits for the period of September 15, 2000, through December 14, 2000; and a 23 percent permanent partial general disability.

The parties have raised the following issues on this appeal:

1. What is the nature and extent of claimant's injury and disability?

Respondent and its insurance carrier contend claimant has failed to prove that the five percent whole body functional impairment, to which the parties stipulated at regular hearing, was caused by his work-related accident. They argue that claimant recovered from the May 2000 accident and later sustained another injury, which has not been shown to be work-related. In the alternative, respondent and its insurance carrier contend that claimant's permanent partial general disability should be limited to the five percent functional impairment rating as claimant has allegedly failed to prove that his wage loss is due to his injury as opposed to an economic downturn.

Conversely, claimant contends that he has a 23.5 percent permanent partial general disability based upon an 18 percent wage loss and a 29 percent task loss.

2. Is claimant entitled to an award for temporary partial disability benefits? If so, in what amount?

Respondent and its insurance carrier contend claimant has failed to prove that any reduction in earnings during the period in question was attributable to his injuries. Therefore, they argue claimant is not entitled to any temporary partial disability benefits.

Conversely, claimant contends he is entitled to an award for $595.46 in temporary partial disability benefits for the 14-week period between September 9, 2000, and December 15, 2000.[1]

3. Should claimant receive more than the five weeks of temporary total disability benefits as were previously paid and awarded by the Judge?

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[1] In computing the amount of temporary partial disability benefits due, claimant used the information taken from his wage records. The first week that claimant utilized was the week ending September 15, 2000, which began on September 9, 2000.

Claimant requests 8.14 weeks of temporary total disability benefits for the period from June 12, 2000, through July 11, 2000, and a second period from August 23, 2000, through September 18, 2000. Accordingly, claimant contends he is entitled to an award for $2,134.88 in temporary total disability benefits, less the amounts previously paid.

Conversely, respondent and its insurance carrier contend the record fails to establish that claimant was off work more than the five weeks previously paid.

4. Is claimant entitled to receive interest pursuant to K.S.A. 44-512b (Furse 1993) because respondent and its insurance carrier failed to pay claimant the equivalent of a five percent permanent partial general disability after the parties allegedly stipulated to that whole body functional impairment at the regular hearing?

Claimant contends that at the regular hearing the parties stipulated he had sustained a five percent whole body functional impairment and, therefore, respondent and its insurance carrier should have paid claimant the equivalent of a five percent permanent partial general disability. Claimant requests interest under K.S.A. 44-512b (Furse 1993) from the date of the regular hearing until the receipt of payment.

Conversely, respondent and its insurance carrier contend they did not stipulate that claimant's five percent whole body functional impairment was caused by his work-related accident and, therefore, they had just cause to refuse payment. Accordingly, respondent and its insurance carrier request the Board to deny claimant's request.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. The parties stipulated that the appropriate date for claimant's work-related accident and resulting back injury was May 30, 2000. The Board also finds the parties stipulated at the regular hearing that claimant sustained a five percent whole body functional impairment as a result of the work-related back injury. When Judge Fuller took stipulations, the Judge and counsel stated:

> The Court: What type of disability do you believe your client has?
>
> Mr. Mann: We're claiming a work disability, Your Honor, based on a reduction of his wage since the date of accident -- well, actually since his return to work in August of this year -- last year.
>
> The Court: What type do you believe he has?

> Mr. Andersen: A functional impairment, 5 percent, from the treating physician. I believe that was a rating from Doctor Dodson, isn't it?
>
> Mr. Mann: Five percent, and we're willing to stipulate to that rating.
>
> . . .
>
> Mr. Mann: The only other issue, I'm sorry to keep raising issues. If we've agreed to the 5 percent rating, which there was not a response from counsel, are we agreeing to that rate?
>
> Mr. Andersen: That's the rating of functional, yeah.
>
> Mr. Mann: We would demand prepayment of permanent partial disability benefits prior to award, pursuant to the act, I think it's 44-512 [sic], although I may be off a number there, because there's no just cause for failing to pay those benefits prior to award. Since we've agreed to the rating we would ask if those benefits aren't paid that the Court assign or assess, per the statute, interest on those benefits from today's date until they are paid. That's the only other issue I would raise, Your Honor.
>
> The Court: And I assume if they are not paid you will put it in your submission letter.

Despite ample opportunity at the hearing, respondent and its insurance carrier's counsel did not raise as an issue to be decided by the Judge whether claimant's five percent whole body functional impairment was caused by the stipulated work-related accident or whether it was caused by a subsequent accident. Respondent and its insurance carrier did not raise that contention until they filed their submission letter with the Judge, at which time the evidentiary record was closed.

Considering counsels' statements at regular hearing, the Board concludes that respondent and its insurance carrier stipulated that claimant's work-related accident resulted in a five percent whole body functional impairment. The Board further concludes that respondent and its insurance carrier did not raise causation as an issue to be determined by the Judge.

2. On May 30, 2000, claimant felt his back pop while stacking tubs or blocks of meat, followed by low back and right leg pain. On June 2, 2000, claimant saw Dr. William A. Dodson, who diagnosed low back strain and placed claimant on light duty. On June 27, 2000, the doctor saw claimant and adjusted his work restrictions. On July 11, 2000, the doctor released claimant to return to regular work.

On August 23, 2000, claimant returned to Dr. Dodson for a recurrence of low back pain and left leg pain. At that time, claimant told the doctor he had been working with blocks. In September 2000, claimant had an MRI and in October 2000 he had electrodiagnostic tests. The MRI showed a small disk bulge at L5-S1, which was probably not impinging upon a nerve root, and the electrodiagnostic tests were normal. The doctor again diagnosed low back strain.

Dr. Dodson last saw claimant on December 14, 2000, and released him with permanent work restrictions against lifting greater than 50 pounds; pushing or pulling greater than 100 pounds; and restrictions against repetitively bending at the waist, twisting, shoveling and sweeping.

The record is not clear but, according to claimant, he missed approximately three weeks of work following the May 30, 2000 incident before returning to see the doctor in August 2000. At the regular hearing claimant's counsel mentions wage records that allegedly show claimant missed work from June 12, 2000, through August 14, 2000, but claimant denied missing more than three weeks of work during that period, and the parties failed to enter those wage records into evidence.

Again, the record is not entirely clear, but it appears that claimant was again off work from approximately August 23, 2000, until approximately September 11, 2000.

Based upon that evidence, the Board agrees with respondent and its insurance carrier that the award for temporary total disability benefits should be limited to the five weeks that have been previously paid and which were awarded by the Judge.

3. Claimant requests temporary partial disability benefits for the period from September 9, 2000, through December 14, 2000. The September 9 date is the approximate date that claimant returned to work after receiving a second round of treatment from Dr. Dodson. And December 14, 2000, is the date Dr. Dodson last saw claimant and determined he was at maximum medical recovery.

According to claimant, he returned to work on approximately September 11, 2000. At that time, claimant was under temporary work restrictions from Dr. Dodson and could not perform his regular job of stacking the tubs or blocks of meat. Respondent accommodated claimant's temporary work restrictions and assigned claimant the job of washing tubs.

The parties entered into evidence claimant's wage records for the period from September 9, 2000, through December 15, 2000, a period of 14 weeks. Those records indicate that during 11 of those 14 weeks claimant earned less than his stipulated pre-

injury average weekly wage of $393.38. For the remaining three weeks, claimant earned more than $393.38.

The Workers Compensation Act provides that temporary partial general disability benefits are paid at two-thirds of the difference between the pre-injury average weekly wage and the amount actually earned after the accident. K.S.A. 1999 Supp. 44-510e(a) provides, in part:

> . . . Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.

The Act does not specifically define when temporary partial disability exists. But K.S.A. 1999 Supp. 44-510e does define permanent partial disability as being "disabled in a manner which is partial in character and permanent in quality." Therefore, by implication, temporary partial disability exists when a worker is disabled in a manner which is partial in character and temporary in quality.

Claimant was temporarily and partially disabled during the period from September 11, 2000 through December 14, 2000, as he was able to perform some substantial and gainful employment but had not reached maximum medical recovery. Accordingly, claimant is entitled to receive temporary partial disability benefits for the period in question in the sum of $628.79, which is two-thirds of the difference between what he actually earned and his pre-injury average weekly wage during that 11-week period.

The Board rejects respondent and its insurance carrier's argument that claimant's reduced hours were due to an economic downturn. Respondent's plant manager, Larry Dohogne, testified that a fire at one of its major suppliers of inedible meats, ConAgra, disrupted respondent's pet food operations and caused a reduction in hours for all those who worked in respondent's pet food operations. But, according to Mr. Dohogne, the ConAgra fire did not occur until December 25, 2000, and, therefore, did not affect the hours claimant worked washing tubs before December 15, 2000.

4. The Judge found that claimant had a 22 percent wage loss and a 23 percent task loss, which created a 23 percent permanent partial general disability. Respondent and its insurance carrier contend claimant should not receive any permanent partial general disability benefits or, in the alternative, that they should be limited to the five percent whole body functional impairment rating as claimant's reduced wages are due to an economic

downturn. Conversely, claimant contends he has an 18 percent wage loss and a 29 percent task loss, which creates a 23.5 percent permanent partial general disability.

Although the Christmas fire at the ConAgra plant diminished the amount of work available to respondent's pet food employees, claimant has also established that some of his wage loss is directly related to his work-related back injury.

Claimant received his permanent work restrictions around December 14, 2000. Respondent then accommodated those restrictions and created a job for claimant operating a fork lift. The wage records indicate claimant, as a fork lift operator, worked 10 weeks between January 27, 2001, and April 6, 2001, in which he worked 34 hours or less. During at least five of those 10 weeks, claimant worked less than 25 hours for the week. Then, beginning the week ending April 13, 2001, claimant worked 40 hours plus overtime for four consecutive weeks, followed by a 24-hour week and a 40-hour week.

Claimant testified at the April 2, 2001 regular hearing, he was at that time only working between 22 and 25 hours per week as compared to the 45 to 48 hours per week that he was accustomed to working before his back injury. When he testified, claimant knew that coworkers who were performing his former job were working more hours than he was as they were then working between 35 to 40 hours per week and sometimes 42 hours per week. That evidence is consistent with Mr. Dohogne's testimony that when claimant was only working 22 to 24 hours per week there were others performing claimant's former job that were continuing to work 40 hours per week. Mr. Dohogne testified, in part:

> Q. (Mr. Mann) All right. Now, my client testified at the regular hearing that there were people on the break-out crew, or the meat stacking crew, that during the periods of time which the wage records will reflect basically in February and March when he was only working 22 to 24 hours a week, there were people on the break-out crew who were still working 40 hours plus per week. Do you recall that testimony?
>
> A. (Mr. Dohogne) Yes.
>
> Q. Were there people in February and March in the break-out crew who got 40 hours per week?
>
> A. Not the majority of them.
>
> Q. But were there people who got 40 hours?
>
> A. There were some, yes.

> Q. And had he been on the break-out crew, he may have been in line to get 40 hours a week?
>
> A. There's a good possibility, yes.
>
> Q. Why do you say that?
>
> A. Because we have other machines that we have. Like I say, everybody alternates their jobs and some would not fit his restrictions.
>
> Q. So had he not had this injury and had he not had the permanent work restrictions which he now has, he would have been in line to work more hours in February and March of 2000? Fair statement?
>
> A. There probably was a few, yes.
>
> Q. And I said 2000. 2001?
>
> A. 2001.[2]

The evidence establishes that claimant sustained a wage loss as a direct consequence of his back injury. Accordingly, claimant is not precluded from a finding of wage loss for determining his permanent partial general disability. That conclusion is consistent with appellate court decisions holding that work disability (a permanent partial general disability greater than the functional impairment rating) is appropriate despite economic layoff. In *Gadberry*, the Court of Appeals held:

> An employee who returns to work at the employee's pre-injury wage and then within a few weeks of the date of return receives a termination notice due to economic layoff is not precluded from a finding of wage loss for workers compensation benefits.[3]

Respondent and its insurance carrier argue that a work disability should be denied in instances where an economic downturn contributes to a worker's wage loss. That

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[2] Deposition of Larry Dohogne, May 29, 2001; at 17, 18.

[3] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, syl. 4, 975 P.2d 807 (1998). Also see, *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, syl. 3, 899 P.2d 516 (1995), which states:

> It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

contention is rejected where there is evidence that the worker's wage loss, as in this instance, was contributed to by the work-related injury.

5. Claimant has an 18 percent wage loss.

At the time of his injury, claimant was earning $8.50 per hour. And at the regular hearing the parties stipulated that claimant's pre-injury average weekly wage was $393.38. But the parties did not stipulate to claimant's post-injury average weekly wage.

The Judge found that claimant's post-injury average weekly wage was $304.08, which is the weekly average of the total wages that claimant received for the period from January 20, 2001, through May 18, 2001. The Judge noted that the record did not contain the wage information for all of December 2000 and January 2001. But that information has now been obtained.[4] Comparing the pre-injury wage of $393.38 to $304.08, the Judge found that claimant had a 22 percent wage loss.

In his submission letter, claimant compares his pre-injury wage to the wages that claimant has earned from December 16, 2000, through May 18, 2001, and argues that he has sustained an 18 percent wage loss. Respondent and its insurance carrier contend that claimant has failed to prove that he has sustained any wage loss due to the low back injury.

In January 2001, claimant's hourly rate was raised to $8.75 per hour.

Under these facts, the Board concludes the best gauge of claimant's post-injury wages after he reached maximum medical recovery is to average the actual earnings that claimant has earned as a fork lift operator. According to claimant's wage records, he has earned $7,137.75 from December 16, 2000, when he began his fork lift job, through May 18, 2001, the last week for which wage records have been provided. For that 22-week period, claimant averaged $324.44 per week in actual earnings. Comparing those average earnings to claimant's pre-injury average weekly wage of $393.38, the Board concludes that claimant has sustained an 18 percent wage loss.

6. Claimant has a 24 percent task loss.

[4] At oral argument before the Board, the parties agreed that they believed the wage records for the period in question (December 16, 2000, through January 19, 2001) had been placed into evidence during the regular hearing. Realizing those records were not included with the regular hearing transcript, the parties then agreed to provide those records to the Board so they might be placed in the regular hearing transcript with the other wage records and considered by the Board.

When the parties took Dr. Dodson's deposition, the doctor reviewed the list of work tasks compiled by Jerry Hardin that claimant had performed in the 15 years immediately before his low back injury. The doctor initially identified six of the 21 total tasks that claimant should no longer perform.

But four of claimant's work tasks were duplicates as Mr. Hardin listed them twice. When the four duplicates are eliminated, the Board finds that Dr. Dodson's ultimate opinion is that claimant should no longer perform four of the 17 tasks, which is an approximate 24 percent task loss.

The Board is mindful Dr. Dodson later testified that despite the 50-pound lifting restriction he placed on claimant that he would permit claimant to perform an additional work task, which would require claimant to exceed his lifting restriction and lift 55 pounds. But the Board concludes that claimant's task loss should be determined by comparing former work tasks with his permanent work restrictions. Accordingly, the Board finds the doctor's initial opinion of task loss, which would approximate 24 percent, more accurate and more persuasive than the doctor's later task loss opinion.

7. Claimant has a 21 percent permanent partial general disability.

Because claimant's back injury is an "unscheduled" injury, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

There is no argument that claimant failed to make a good faith effort to find appropriate employment after he recovered from his injury. Accordingly, claimant's actual wages should be used in determining his permanent partial general disability. The Board concludes claimant has a 21 percent permanent partial general disability, which is an average of the 18 percent wage loss and the 24 percent task loss.

8. Claimant's request for interest should be granted.

The Workers Compensation Act provides that interest can be assessed against an employer and its insurance carrier when there is not just cause or excuse to pay compensation before a final award. K.S.A. 44-512b (Furse 1993) reads:

> Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee **shall** be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest **shall** be assessed against the employer or insurance carrier liable for the compensation and **shall** accrue from the date such compensation was due. (Emphasis added.)

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Copeland*, at 320.

At the regular hearing, respondent and its insurance carrier stipulated to claimant having a five percent whole body functional impairment as a result of his work-related back injury. As K.S.A. 1999 Supp. 44-510e provides that "permanent partial general disability shall not be less than the percentage of functional impairment," respondent and its insurance carrier lacked just cause and excuse from paying claimant the equivalent of a five percent permanent partial general disability. As indicated above, respondent and its insurance carrier's argument that it did not stipulate that claimant sustained a five percent functional impairment due to his work-related injury is without merit.

The Board concludes that claimant is entitled to interest on $5,442.10 (which is the equivalent of a five percent permanent partial general disability) at the interest rate provided for in K.S.A. 16-204, as amended, from the date of the regular hearing on April 2, 2001, until such time as respondent and its insurance carrier pay claimant those benefits.[8]

AWARD

WHEREFORE, the Board modifies the June 18, 2001 Decision entered by Judge Fuller and awards claimant five weeks of temporary total disability benefits, 14 weeks of temporary partial disability benefits, which, when converted to temporary total disability benefits, equals 2.4 weeks of temporary total disability benefits in the sum of $628.79, a 21 percent permanent partial general disability and interest, as provided above.

Arturo Aguilar is granted compensation from Americold Logistics, Inc., and its insurance carrier for a May 30, 2000 accident and resulting disability. Based upon an average weekly wage of $393.38, Mr. Aguilar is entitled to receive five weeks of temporary total disability benefits at $262.27 per week, or $1,311.35, plus 14 weeks of temporary partial disability benefits which, when converted to temporary total, equals 2.4 weeks of temporary total disability benefits, or $628.79, plus 87.15 weeks of permanent partial general disability benefits at $262.27 per week, or $22,856.83, for a 21 percent permanent partial general disability, making a total award of $24,796.97, plus interest as provided above.

As of January 31, 2002, there would be due and owing to Mr. Aguilar five weeks of temporary total compensation at $262.27 per week, or $1,311.35, plus 14 weeks of temporary partial compensation totalling $628.79, plus 79.89 weeks of permanent partial compensation at $262.27 per week, or $20,952.75, for a total due and owing of $22,892.89, which is ordered paid in one lump sum less any amounts previously paid.

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[8] See *Ballinger v. Millbrook Offices - Kansas*, WCAB Docket No. 217,404 (Oct. 1997).

Thereafter, the remaining balance of $1,904.08 shall be paid at $262.27 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the June 18, 2001 Decision that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. K.S.A. 44-511(a)(5) (Furse 1993) defines a full-time hourly employee as

> only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week. . . .

Claimant was a full-time employee of respondent. Larry Dohogne, respondent's plant manager, considered claimant to be a full-time employee even after he was returned to work after the accident. The majority in the above matter has calculated claimant's return to work average weekly wage as though he were a part-time hourly employee. As claimant's original date of accident wage was calculated as though he were a full-time hourly employee and as claimant is currently considered to be a full-time hourly employee, the majority has erred in not calculating claimant's post-injury wage appropriately.

In considering the evidence attached to the deposition of Mr. Dohogne, claimant was paid $8.75 per hour after his return to work. For a full-time hourly employee, this computes to a base weekly wage of $350 per week. For the 12 weeks for which records

are attached to Mr. Dohogne's deposition, claimant earned $390.48 in overtime, which computes to $32.54 per week in overtime pay. When added to claimant's base wage, this computes to a wage of $382.54, which is 97 percent of claimant's stipulated average weekly wage of $393.38.

The majority, by inappropriately calculating claimant's post-injury return to work average weekly wage in violation of K.S.A. 44-511 (Furse 1993), has artificially created a work disability for a claimant who currently is returned to work with respondent at 90 percent or more of the wage he was earning at the time of the accident. K.S.A. 1999 Supp. 44-510e states, in part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

While this Board Member acknowledges claimant worked less than 40 hours per week for a period of time (even during one week in May 2001), it is evident from the information attached to Mr. Dohogne's deposition that by April and May 2001 claimant was a full-time hourly employee and his average weekly wage under K.S.A. 44-511 (Furse 1993) should be computed as such.

This Board Member would restrict claimant to his functional impairment effective April 7, 2001, by which time, according to the payroll records, claimant again began working 40 hours per week on a fairly regular basis.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director